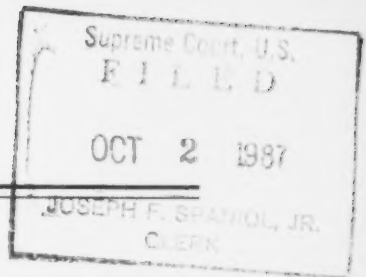


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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHRISTOPHER DEBOCK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA**

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QUESTIONS PRESENTED

1. Whether certiorari should be granted as the Supreme Court of Florida has decided in important question regarding an attorney's federal equal protection rights, by using a standard and reasoning which is in direct conflict with decisions of this Court?
2. Whether certiorari should be granted, as the lower court's *dicta*, expressing its belief that the equal protection issue might not be ripe, directly conflicts with federal constitutional principles announced by this Court?
3. Whether this Court should grant certiorari since, whether attorneys can be singled out for differing treatment for the exercise of their constitutional rights, is an important federal question concerning equal protection of the law?

**LIST OF ALL PARTIES
TO THE PROCEEDINGS**

The following is a list of all parties to the proceeding in the Supreme Court of Florida, whose judgment is sought to be reviewed herein by this Petitioner:

The State of Florida
Christopher DeBock

As Amicus, on Rehearing:

The Florida Bar

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND
THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED
STATES:

Your Petitioner, CHRISTOPHER DEBOCK, prays that a writ of certiorari issue to the Supreme Court of Florida to review its decision entered on September 4, 1987, denying rehearing and thus letting stand its Opinion of July 16, 1987, finding that Petitioner, a subpoenaed witness in a criminal case in the State of Florida, could not assert his Fifth Amendment privilege to incriminating questions, unless and until provided immunity from the use of his testimony in any disciplinary Bar hearing, as is automatically conferred upon other professionals licensed under the State of Florida, who are subpoenaed to testify in a criminal case, pursuant to Section 914.04, Fla.Stat.

OPINIONS BELOW

The Order, dated November 14, 1984, of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, finding that Petitioner had a valid Fifth Amendment right to remain silent, unless and until Bar immunity was conferred upon him, is attached hereto as Appendix A. The

Opinion of the Fourth District Court of Appeal for the State of Florida, dated March 27, 1985, quashing the Circuit Court's Order, is attached hereto as Appendix B. The Supreme Court of Florida's initial Opinion, dated October 30, 1986, reversing the Fourth District Court of Appeal, is attached hereto as Appendix C. The Supreme Court's Opinion, dated July 16, 1987, which, upon rehearing, affirmed the Fourth's District's March 27, 1985 Opinion, is attached hereto as Appendix D.

JURISDICTION

After the Supreme Court of Florida issued its Opinion on rehearing on July 16, 1987, Petitioner timely filed a motion for rehearing. This motion was denied on September 4, 1987 (*see* Appendix E). Thereafter, upon Petitioner's motion, the Supreme Court of Florida granted a stay of the proceedings "to and including October 5, 1987, to allow petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that Court" (*see* Appendix F). This Petition has been filed in this Court prior to October 5, 1987, and a motion to continue the stay has been contemporaneously filed and addressed to the Honorable Antonin Scalia, the Associate Justice appointed to this Circuit. Thus, the Petition is timely; and has been taken to review an opinion of the highest court of the State of Florida; upon which we invoke this Court's jurisdiction, under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Florida Constitution

Article II, Section 3:

Branches of Government.

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Article V, Section 15:

Attorneys; Admission and Discipline.

The Supreme Court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.

Florida Statutes

914.04. Witnesses; person not excused from testifying or producing evidence in certain prosecutions on ground testimony might incriminate him; use of testimony given or evidence produced

No person who has been duly served with a subpoena or subpoena duces tecum shall be excused from attending and

testifying or producing any book, paper, or other document before any court having felony trial jurisdiction, grand jury, or state attorney upon investigation, proceeding, or trial for a violation of any of the criminal statutes of this state upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no testimony so given or evidence so produced shall be received against him upon any criminal investigation or proceeding. Such testimony or evidence, however, may be received against him upon any criminal investigation or proceeding for perjury committed while giving such testimony or producing such evidence or for any perjury subsequently committed. (As amended, 1983).

STATEMENT OF THE CASE

Nature of the Case and Its Disposition

Christopher DeBock, Petitioner, was served with a deposition subpoena, issued pursuant to Section 27.04, Fla.Stat., by the State Attorney's Office for the Seventeenth Judicial Circuit of the State of Florida, seeking Petitioner's testimony in connection with a criminal case, *State of Florida v. Richard Rendina*, Case No. 84-6521-CF10, pending in that Circuit. After appearing, but refusing to testify, the State petitioned the trial court for a rule to show cause why the Petitioner should not be held in contempt. After briefing and oral argument, the Honorable Harry G. Hinckley, Circuit Court Judge, denied the State's request, holding that this Petitioner could validly assert his Fifth Amendment right, despite service of the subpoena and the application of Section 914.04, Fla.Stat. Judge Hinckley's Order, detailing his ruling and rationale therefor, is dated November 14, 1984 (see Appendix A).

The State thereafter filed a petition for a common law writ of certiorari to the Fourth District Court of Appeal for the State of Florida; and, on March 27, 1985, that court issued its writ, quashing Judge Hinckley's previous November 14, 1984 Order. (See Appendix B) A timely motion for rehearing was filed by Petitioner, but was denied on May 15, 1985.

Petitioner thereafter sought discretionary review from the Supreme Court of Florida. The Supreme Court accepted jurisdiction by order dated October 21, 1985.

This case was fully briefed and orally argued in the Supreme Court, ultimately resulting in an Opinion, dated October 30, 1986, which reversed the writ previously issued by the Fourth District Court of Appeal. (See Appendix C) The Respondent, State of Florida, then moved for rehearing; and, shortly thereafter, The Florida Bar sought permission to appear as Amicus, which permission was granted. Rehearing was granted, and another oral argument was held. Thereafter, the Supreme Court of Florida—having replaced two of its Justices in the interim—issued a new Opinion, dated July 16, 1987. Without addressing the procedural status of its new decision (i.e., upon rehearing only), the Supreme Court of Florida

now reversed its earlier ruling in its entirety, and affirmed the Opinion of the Fourth District Court of Appeal. (See Appendix D)

Petitioner sought timely rehearing of this new Opinion, which was denied on September 4, 1987. (See Appendix E) Upon petitioner's further motion, on September 9, 1987, the Supreme Court of Florida stayed these proceedings "to and including October 5, 1987, to allow petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that court." See Appendix F.

The instant Petition follows.

Statement of Facts

This Petitioner is an attorney and member of The Florida Bar. At the time of the events herein, Mr. DeBock was an Assistant State Attorney for the Seventeenth Judicial Circuit, in and for Broward County, Florida.

On November 7, 1985, he appeared at a deposition, pursuant to the service of a subpoena issued by the State of Florida, which sought his testimony in a criminal case then pending in that Circuit. That case, *State of Florida v. Richard Rendina*, Case No. 84-6521-CF10, charged that the defendant, a criminal defense attorney, had offered a bribe to an Assistant State Attorney, this Petitioner, in return for favorable treatment for a client.

When appearing on November 7, 1985, pursuant to the subpoena, Petitioner refused to answer the questions propounded, asserting instead his privilege against self-incrimination.

On the same day, the State of Florida moved the trial court for a rule to show cause why Petitioner should not be held in contempt, given the operation of Section 914.04, Fla.Stat., which purports to extend full use and derivative use immunity upon witnesses who are compelled to testify pursuant to a subpoena issued under Section 27.04, Fla.Stat. Petitioner explained that his continued assertion of his privilege against

self-incrimination, despite the use immunity conferred by statute, rested upon the State's inability to extend immunity from its use in Bar disciplinary action, and its failure to apply to the Florida Supreme Court for such immunity, in accord with *Ciravolo v. The Florida Bar*, 361 So.2d 121 (Fla. 1978).

The State—persisting in its position that its only obligation in order to obtain Petitioner's compelled and immunized testimony was the service of the subpoena, notwithstanding Petitioner's status as an attorney licensed by the State—announced its firm intention to actively pursue disciplinary action against the Petitioner before the Bar. Thus, despite its decision to obtain Petitioner's immunized testimony and thus forego his prosecution in the criminal proceedings it had instituted, no Bar immunity was sought. Throughout these proceedings, the State has never contested the self-incriminatory nature of the testimony it seeks to elicit from the Petitioner here, nor its intent to seek disciplinary measures against him before The Florida Bar, as a result of the subject matter of his intended testimony.

After arguments of counsel the Circuit Court, through the Honorable Harry G. Hinckley, denied the State's rule to show cause. Judge Hinckley's ruling, memorialized by written order dated November 14, 1984 (*see* Appendix A) was predicated upon the following findings:

It is the finding of this Court that the case authorities cited on behalf of the Witness hold that:

(1) The Fifth Amendment applies to Florida Bar disciplinary proceedings;

(2) The use immunity conferred upon the Witness pursuant to Section 914.04 does not reach Bar disciplinary proceedings and would not immunize the Witness from his testimony being used against him in a Florida Bar proceeding;

(3) That only the Supreme Court of Florida can confer immunity in Bar proceedings and that the State has had the option of petitioning the Supreme Court of Florida for the necessary immunity grant.

Judge Hinckley further found that:

[T]he Witness has a substantial and imminent danger of prosecution both before The Florida Bar in disciplinary proceedings and in possible criminal sanctions. In this regard the Court notes that the State Attorney has represented its intention to pursue Florida Bar disciplinary proceedings against the witness.

Appendix A, pp. 2-3

The State thereafter petitioned the Fourth District Court of Appeal for a writ of common law certiorari, seeking to quash the trial court's order refusing to hold Petitioner in contempt. On March 27, 1985, the Fourth District Court of Appeal granted the writ and quashed the trial court's order, finding that it is the Petitioner who must shoulder the responsibility for seeking immunity from Bar disciplinary proceedings. Appendix B, p. 2. It added that "[t]he reason for this rule is that Bar disciplinary proceedings are remedial, not punitive; they are designed to determine the lawyer's fitness to practice so as to protect the public, not to punish the lawyer in question." *Id.* Basing this legal pronouncement solely upon law of other jurisdictions, *see* Appendix B, pp. 2-4, the Fourth District further held, that since Bar disciplinary proceedings were not penal in nature, a witness may not properly invoke his Fifth Amendment privilege for fear that his answers may tend to incriminate him if used by the Bar in disciplinary proceedings instituted against him. Appendix B, p. 4.

From this ruling Petitioner sought review from the Supreme Court of Florida, as the Fourth District Court's Opinion expressly conflicted with its holding in *Ciravolo v. The Florida Bar*, 361 So.2d 121 (Fla. 1978); and *Lurie v. Florida State Board of Dentistry*, 288 So.2d 223 (Fla. 1973).

Jurisdiction was accepted on this ground (Appendix C, p. 1); and, after full briefing and oral argument, the Supreme Court issued its Opinion dated October 30, 1986. (Appendix C) In this Opinion (in which four members concurred, and three members concurred in part, and dissented in part), the Supreme Court of Florida agreed with the propositions advanced by this Petitioner; viz., 1) that Bar proceedings, like all

other administrative disciplinary proceedings under Florida law, are penal in nature (Appendix C, p. 3-4); 2) that, as a result, the constitutional privilege against self-incrimination applies (*id.* at 4); 3) that immunity from the use of such testimony in administrative disciplinary proceedings under Florida law is automatically conferred by the service of a subpoena, pursuant to Section 914.04, Fla.Stat. (*id.* at 2); 4) pursuant to *Ciravolo v. The Florida Bar*, 361 So.2d 121 (Fla. 1978), the separation of powers doctrine, contained in the Florida Constitution, prohibits such immunity from being conferred solely by the automatic immunity statute, Section 914.04, Fla.Stat. (1983); (*id.* at 3-4) but may be granted, pursuant to *Ciravolo*, *supra*, upon application to the Florida Supreme Court (*id.* at 4-5); and 5) the duty of making such application is the prosecutor's, not the witness' (*id.* at 5).

After such Opinion issued, the Respondent, State of Florida, sought rehearing. Thereafter, the Florida Bar requested and was granted (over objection), permission to appear as Amicus for the Respondent, in order to also seek rehearing, albeit on different grounds. Over Petitioner's objection, rehearing was granted.

The Supreme Court of Florida, on rehearing, issued a new Opinion dated July 16, 1987. Without addressing the procedural status of its new decision (i.e., upon rehearing only), the Supreme Court of Florida—now having lost two of its members to the original opinion—reversed its Opinion in its entirety. (See Appendix D) Specifically, the Supreme Court of Florida has now held that 1) bar proceedings are remedial, not penal, in nature (*id.* at 4); 2) that a rational basis exists “for holding attorneys to different standards” than those of other professions licensed by the State of Florida (*id.* at 7-8); and 3) that even though Petitioner had no right to refuse to answer until receiving Bar immunity, Bar immunity, pursuant to the holding in *Ciravolo v. The Florida Bar*, 361 So.2d 121 (Fla. 1976), would still be conferred by it “where it appears that the greater good to society will be served,” if requested by the witness, not the State (*id.* at 8-9).

Because this new July 16, 1987 Opinion, for the first time, directly raised the federal constitutional issue of equal protection of the laws, as protected by the Fourteenth Amendment to the Constitution of the United States, Petitioner sought rehearing. Specifically, Petitioner pointed out that the Florida Supreme Court had erroneously upheld this differed treatment upon a "rational basis" standard; when federal constitutional case law of this Court requires heightened scrutiny and a compelling state interest before a law, which classifies persons in such a way as to infringe upon their constitutional rights, can be constitutionally upheld. Further, the Petitioner noted that Federal constitutional law holds that the distinction between a privilege versus a right—which the Florida Supreme Court addressed in finding such a rational basis—has no significance in determining whether a law violates equal protection. Finally, the Motion for Rehearing addressed the fact that, if determined upon the appropriate "strict scrutiny" standard, the Florida Supreme Court would necessarily have to come to a different result in resolving the equal protection issue, as neither the Respondent nor Amicus had advanced any "compelling state interest" which would be served by depriving lawyers of their privilege against self-incrimination; and that no such "compelling state interest" could be fashioned to overcome this fundamental right. Our motion for rehearing was, nevertheless, denied.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED AS THE SUPREME COURT OF FLORIDA HAS DECIDED AN IMPORTANT QUESTION REGARDING AN ATTORNEY'S FEDERAL EQUAL PROTECTION RIGHTS, BY USING A STANDARD AND REASONING WHICH IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT

In rewriting its Opinion upon rehearing, to deny penal status to Bar proceedings, the Supreme Court ripened an issue that was addressed but not fully briefed by the parties herein; viz., whether, consistent with the Equal Protection Clause of the

Fourteenth Amendment to the Constitution of the United States, the Supreme Court can find Bar disciplinary matters remedial for Fifth Amendment purposes; when, by consistent precedent, see *Florida State Board of Architecture v. Seymour*, 62 So.2d 1 (Fla. 1952); *Lurie v. Florida State Board of Dentistry*, 288 So.2d 223 (Fla. 1974); *State ex rel. Vining v. Florida Real Estate Commission*, 281 So.2d 386, 391 (Fla. 1973); see also *Anson v. Florida Board of Architecture*, 354 So.2d 386 (Fla. 1st DCA 1977); *Metropolitan Dade County v. Mandelkern*, 372 So.2d 204 (Fla. 3rd DCA 1979); all other disciplinary licensing proceedings in the State of Florida are penal in nature for Fifth Amendment purposes. The direct effect of this pronouncement is to deny to attorneys of this State the right to first obtain use immunity in disciplinary proceedings before being compelled to testify, a right which all other licensed professionals in Florida enjoy by automatic effect of Section 914.04, Fla.Stat. (1983). Thus, attorneys, as a class, are singled out and denied this federal constitutional protection, which is otherwise available to other similarly situated professionals in this State.

Further, in *sua sponte* reaching this equal protection issue, the Florida Supreme Court applied the "rational basis" standard of review, which is not an available standard where—as here—a constitutional right hangs in the balance.

Each of these federal constitutional issues—ripened for the first time by its July 16, 1987 Opinion—were brought to the attention of the Supreme Court of Florida by Petitioner's motion for rehearing. Nonetheless, the Florida Supreme Court, with two justices dissenting, denied rehearing.

This Court ought to grant certiorari as the Florida Supreme Court's adherence to the "rational basis" standard to resolve this equal protection issue is in direct and unresolvable conflict with the cases of this Court.

Specifically, this Court has uniformly held that "where a law classifies in such a way as to infringe constitutionally-protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required." *Attorney General of New York v. Soto-Lopez*, —U.S.—, 106 S.Ct. 2317 (1986). See also,

City of Cleburne v. Cleburne Living Center, ____ U.S. ____, 105 S.Ct. 3249, 87 L.Ed. 2313 (1985); *Martinez v. Bynum*, 461 U.S. 321, 328 n.7 (1983); *Plyler v. Doe*, 457 U.S. 202, 216-217 & n.15 (1982); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262 (1974); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16 & n.39, 30-32, 40 (1973); *Police Dept. of Chicago v. Mosley*, 408 U.S. 91, 101 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Shapiro v. Thompson*, 374 U.S. 618, 634 (1969); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). Such heightened scrutiny requires that such laws "be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne*, *supra*, 105 S.Ct. at 3255.

We urge this Court grant certiorari, so that this federal question may be resolved utilizing the proper "strict scrutiny" standard.

Further, the Florida Supreme Court found an acceptable legal difference, between lawyers and other licensed professionals, in the assertion that the practice of law is a privilege, not a right. The accuracy of this assertion is not only called into question by federal constitutional principles announced in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985); but also has been rejected as a justifiable distinction under federal equal protection analysis as well. See e.g., *Sherbert v. Verner*, 374 U.S. 398, 404, (1963) (where this Court announced that an equal protection challenge cannot be answered by asserting that the regulated area in question is a "privilege" rather than a right where the action infringes upon a person's constitutionally protected religious beliefs).

Finally, by adhering to the vitality of *Ciravolo v. The Florida Bar*, 361 So.2d 121 (Fla. 1978), in announcing the availability of use immunity in Bar proceedings from the Florida Supreme Court, on the one hand; and finding Bar proceedings remedial on the other, the Florida Supreme Court has resolved the legal issues herein in a manner totally inconsistent with federal constitutional law regarding the extent and reach of the privilege against self-incrimination and its prophylactic counterpart, immunity.

Immunity's only purpose is to supplant a valid privilege against compulsory self-incrimination. Once "a grant of immunity has removed the dangers against which the privilege protects," a witness is no longer justified in refusing to answer questions on this ground. *Kastigar v. United States*, 406 U.S. 441, 449 (1972). Conversely, if no valid privilege can be asserted to prevent testimony—because the witness has no fear of incrimination leading to criminal sanctions or to a penalty or forfeiture—then immunity is similarly not available.

The Florida Supreme Court's opinion here, finding Bar proceedings remedial (i.e., not resulting in a penalty or forfeiture for purposes of the privilege) is thereby totally inconsistent with *Ciravolo's* holding that immunity is available and may be sought from the Florida Supreme Court.

As the Florida Supreme Court in its Opinion has directly acknowledged the continued full force and effect of *Ciravolo, supra*, its further finding that Bar proceedings are remedial also violates federal constitutional law, as set forth in *Kastigar v. United States, supra*.

We urge this Court grant certiorari so the applicable federal constitutional principles may be applied. We aver, that upon the appropriate federal constitutional principles, the Florida Supreme Court's decision—that attorneys may be singled out for the deprivation of their constitutional right to remain silent, to which all other similarly-situated state licensed professionals are afforded—will be manifest; and a reversal of this finding will be mandated.

II.

CERTIORARI SHOULD BE GRANTED, AS THE LOWER COURT'S *DICTA* EXPRESSING ITS BELIEF THAT THE EQUAL PROTECTION ISSUE MIGHT NOT BE RIPE DIRECTLY CONFLICTS WITH FEDERAL CONSTITUTIONAL PRINCIPLES ANNOUNCED BY THIS COURT

The Florida Supreme Court, in its July 16, 1987 Opinion, inferred that the 1983 amendment to the immunity statute has called into question the continued vitality of automatic use

immunity in other disciplinary proceedings of State licensed individuals, and thus the equal protection issue might be avoided. First, this misapprehends the legal effect of the amendment; and, second, misapprehends the federal constitutional law concerning what proceedings are "penal" for purposes of the Fifth Amendment.

Prior to its amendment in 1983, Section 914.04, Fla.Stat., provided reads as follows:

No person, having been duly served with a subpoena or subpoena duces tecum, shall be excused from attending and testifying or producing any book, paper, or other document before any court having felony trial jurisdiction, grand jury, or State Attorney, upon investigation, proceeding, or trial for a violation of any of the criminal statutes of this state upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce testimony so given or production shall be received against him upon any criminal investigation or proceeding.

This statute was construed by the Supreme Court as conferring transactional immunity with regard to any matter or transaction about which the testimony concerned, against any "crime or . . . penalty or forfeiture." *Tsavaris v. Scruggs*, 360 So.2d 745 (Fla. 1977). Prior to this opinion, the Supreme Court had already found that administrative disciplinary proceedings involving licensed professionals involved "a penalty or forfeiture." *Florida State Board of Architecture v. Seymour*, 62 So.2d 1 (Fla. 1952); *Lurie v. Florida State Board of Dentistry*, 288 So.2d 223 (Fla. 1973); *State ex rel. Vining v. Florida Real Estate Commission*, 281 So.2d 386, 391 (Fla. 1973).

Because transactional immunity exceeded the protection that federal Constitution required, see *Kastigar v. United States*, 406 U.S. 441 (1972), it was incumbent upon the legislature to directly list the proceedings which would thus be barred. For

this reason, the statute directly referred not only to barring of criminal prosecutions but also to those involving "penalties and forfeitures."

In amending the statute, to confer "use" immunity, all language requiring "transactional" immunity was omitted. See 914.04, Fla.Stat. (1983), which is reprinted above. (See "Constitutional and Statutory Provisions Involved," *supra*) The inclusion of language that "no person shall be prosecuted or subjected to any penalty or forfeiture" was thus omitted, as the statute was now in accord with federal constitutional law. Under federal constitutional law, "use" immunity not only proscribes the use of compelled testimony thereunder in criminal action, but also in those proceedings found to involve penalties and forfeitures (i.e., proceedings found to be "penal" in nature). *United States v. U.S. Coin & Currency*, 402 U.S. 715, 718 (1972); accord. *Counselman v. Hitchcock*, 142 U.S. 547 (1892). This is a matter of legal construction. *United States v. Ward*, 448 U.S. 242 (1980); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). See also *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

As the Florida Supreme Court has consistently found that administrative disciplinary proceedings in this State involve a "penalty or forfeiture," see e.g., *Florida State Board of Architecture v. Seymour*, 62 So.2d 1 (Fla. 1952); *Lurie v. Florida State Board of Dentistry*, 288 So.2d 223 (Fla. 1973); *State ex. rel. Vining v. Florida Real Estate Commission*, 281 So.2d 386, 391 (Fla. 1973), federal constitutional law alone requires that the Fifth Amendment privilege—and its counterpart, immunity—be fully applicable to such proceedings. Indeed, the Florida Supreme Court's opinion in *Ciravolo v. The Florida Bar*, 371 So.2d 122 (Fla. 1978)—which was explicitly reaffirmed in the Court's opinion here—directly states as much.

Thus, the mere fact that the Florida legislature rewrote its statute, and omitted certain language which was no longer necessary for the purpose of conferring "use" rather than "transactional" immunity, has simply no impact upon previous Florida Supreme Court precedent about what is considered a "penalty or forfeiture."

Thus, if certiorari were granted, Petitioner would urge that the Florida Supreme Court's unconstitutional federal-equal protection impact of its Opinion cannot be overlooked simply because of the rewriting of the immunity statute. Unless and until these previous cases, finding administrative disciplinary proceedings penal in nature, are all overruled (a position which the Florida Supreme Court was seemingly unwilling to do), all other licensed professionals in the State of Florida will be invested with the right to invoke the Fifth Amendment privilege and its protections, but lawyers will not.

III.

**THIS COURT SHOULD GRANT CERTIORARI SINCE,
WHETHER ATTORNEYS CAN BE SINGLED
OUT FOR DIFFERING TREATMENT FOR THE
EXERCISE OF THEIR CONSTITUTIONAL RIGHTS,
IS AN IMPORTANT FEDERAL QUESTION
CONCERNING EQUAL PROTECTION OF THE LAW**

The substantive question of whether attorneys can be placed in a separate classification, different from all other licensed professionals, and thereby singly deprived of their constitutional right to remain silent under the Fifth Amendment to the United States Constitution, is an important federal question, the resolution of which should be made by this Court, the final arbiter of what the Constitution requires.

This Court has repeatedly rejected asserted "compelling interests" as justifying any infringement upon the privilege against self-incrimination. See *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977), in which these cases, and the proffered compelling interests rejected in them, are discussed.

Further, this Court has specifically concluded that "[w]e find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others," in ruling that a member of the New York Bar could not be disbarred, simply because he had asserted his constitutional privilege against self-incrimination and refused to testify. *Spevack v. Klein*, 385 U.S. 511, 516 (1967).

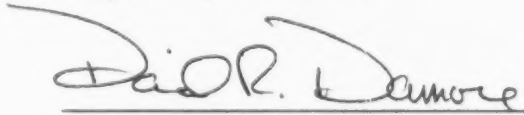
Despite these pronouncements on the scope of these federal constitutional rights, the Florida Supreme Court has now classified lawyers separate from all other professionals "so as to deny [the privilege] to some and extend it to others." *Spevack, id.*

Because such ruling is of critical federal constitutional importance to all lawyers licensed in the State of Florida, and because the federal substantive law regarding both the Fifth and Fourteenth Amendments would condemn the result reached herein, we urge this Court grant certiorari and reverse, as the law and justice requires.

CONCLUSION

For all the above and foregoing reasons, this Court ought to grant certiorari, and review and reverse the Florida Supreme Court's unconstitutional opinion herein.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "David R. Damore", written over a horizontal line.

DAVID R. DAMORE, ESQ.

P.O. Box 39312

Fort Lauderdale, FL 33319

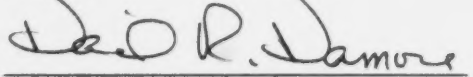
(305) 566-6613

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the above and foregoing to be served, this 5th day of ~~September~~ ^{October}, 1987, upon the following:

Dave Miller, Esq.
Attorney General's Office
Dept. of Legal Affairs
Capital Building
Tallahassee, FL 32399-1050

A handwritten signature in dark ink, appearing to read "David R. Damore", is written over a horizontal line.

David R. Damore, Esq.

APPENDIX

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APPENDIX A

In The Circuit Court of the 17th Judicial Circuit,
In and For Broward County, Florida

Case No: 84-6521CF10

Judge: HINCKLEY

In Re: Case No:

STATE OF FLORIDA,

Plaintiff,

vs.

RICHARD F. RENDINA,

Defendant.

IN RE: State Attorney Investigation: Christopher DeBock.

ORDER

THIS CAUSE, having come on to be heard upon motion of the State Attorney, pursuant to this Court's having granted the State's initial Petition for Order to Show Cause dated November 7, 1984, and this Court having issued an Order to Show Cause dated November 7, 1984, and pursuant to stipulation by both parties, set this matter for hearing on November 13, 1984 to determine the validity of the objections raised on behalf of the Witness, Christopher DeBock, said objections pertaining to his refusal to answer questions propounded to him at a deposition conducted by Assistant State Attorney Stephen Russell pursuant to the issuance of a State's subpoena served on the Witness. This Court, after consideration of the Witness' Motion to Dismiss Order to Show Cause dated November 9, 1984, having heard argument of counsel, did determine that the Witness' Motion to Dismiss Order to Show Cause was well-founded. However, this Court, in an effort to resolve the issues

at hand, and with the agreement of all parties, did go forward to determine the validity of Witness' assertion to his Fifth Amendment right to refuse to answer questions of an incriminating nature. In this regard, the Court chose to hear argument of counsel as to the issue of whether or not the applicable case law and the implimentation of the holdings of the cases of *Ciravolo v. Florida Bar*, 361 So.2d 121 (Fla. 1978); *Florida Bar v. Doe*, 384 So.2d 30 (Fla. 1980); *State v. Kelley*, 71 So.2d 887 (Fla. 1954); *Murphy v. Waterfront Commission of New York Harbor*, 84, S.Ct. 1594 (1964); *Spevak v. Klein*, 87 S.Ct. 625 (1967); and *Delisi v. Smith*, 423 So.2d 934 (2nd DCA 1982), required that this Court hold that the immunity conferred upon the Witness pursuant to Florida Statute §914.04 (which confers use and derivitive use immunity), would be co-extensive with the immunity grants contemplated in the *Ciravolo*, *Doe*, and *Delisi* holdings.

First, however, this Court deemed it necessary to determine whether the Witness could validly raise his rights under the Fifth Amendment and establish the threshold that would properly allow for the assertion thereof. In this regard the Court, having heard argument of each counsel and noting the unrefuted record finds that Witness DeBock meets the criteria for raising the issues of the Fifth Amendment. The Court finds that the Witness has a substantial and imminent danger of prosecution both before the Florida Bar in disciplinary proceedings and in possible criminal sanctions. In this regard the Court notes that the State Attorney has represented its intention to pursue Florida Bar disciplinary proceedings against the Witness. Additionally, this Court finds that the answers sought would be incriminating in nature; that the Witness has a reasonable fear of prosecution; and that his testimony would be used against him.

This Court has considered the argument of Assistant State Attorney Stephen Russell. The State's position it is that Florida Statute §914.04 confers use immunity and derivitive use immunity due to the compelled nature of the testimony sought by the issued State subpoena and has cited to the Court various authorities. This Court does not take issue with the holdings cited by the State; however, this argument does not reach the

issue of whether an attorney, who is a member in good standing of the Florida Bar, can assert his Fifth Amendment rights and continue to refuse to answer questions propounded in the State's criminal proceedings where there exists a likelihood of Bar disciplinary proceedings.

It is the finding of this Court that the case authorities cited on behalf of the Witness hold that:

1) The Fifth Amendment applies to Florida Bar disciplinary proceedings;

2) The use immunity conferred upon the Witness pursuant to §914.04 does not reach Bar disciplinary proceedings and would not immunize the Witness from his testimony being used against him in a Florida Bar proceeding;

3) That only the Supreme Court of Florida can confer immunity in Bar proceedings and that the State has had the option of petitioning the Supreme Court of Florida for the necessary immunity grant.

Further, the State Attorney has been aware since June, 1984 that the Witness would raise as part of his objections to testifying pursuant to the State's subpoena, his rights under the Fifth Amendment in this regard. This Court notes that the State Attorney has not diligently pursued this matter and has laid its problem at the foot of this Court on the very date on which this case is scheduled to proceed to trial.

This Court is now in the midst of a multi-defendant trial, and having determined that the issue raised under the *Ciravolo* rationale is dispositive has ruled. The Court however recognizes that there are additional grounds which might have been argued by the Witness in his assertion of his Fifth Amendment rights. Due to time constraints placed on the Witness, those matters have not been raised. It is in this regard that this Court determines that the Witness has not waived any right to raise those issues should they become germane in future proceedings.

IT IS THEREFORE the finding of this Court that the Witness has validly asserted his rights under the Fifth Amendment to the United States Constitution and that this Court finds that the Witness should not be held in contempt for his failure to answer questions propounded to him by the State Attorney on November 7, 1984, and can validly continue to assert his Constitutional rights pursuant to the Fifth Amendment.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida this 14th day of November, 1984.

HARRY G. HINCKLEY,
Circuit Court Judge

Copies furnished:

David Damore, Esquire
Counsel for the Witness

Assistant State Attorney
Stephen Russell

APPENDIX B

In The District Court of Appeal
of The State of Florida
Fourth District

January Term 1985

Case No. 84-2632

STATE OF FLORIDA,

Petitioner,

v.

RICHARD F. RENDINA,

Respondent.

Opinion filed March 27, 1985

Petition for writ of common law certiorari from the Circuit Court of Broward County; Harry G. Hinckley, Jr., Judge.

Jim Smith, Attorney General, Tallahassee, and Joan Fowler Rossin, Assistant Attorney General, West Palm Beach, for petitioner.

David R. Damore and Laura R. Morrison, Fort Lauderdale, for respondent.

DOWNEY, J.

By petition for writ of common law certiorari the state seeks review of an order of the circuit court, which held, on Fifth Amendment grounds, that Christopher DeBock could not be compelled to testify in a criminal prosecution. We grant the writ and quash the order under review.

The pending criminal proceeding involves charges against Richard F. Rendina, a lawyer, for offering unlawful compensation to Christopher DeBock, an assistant state attorney, to affect the disposition of a criminal case pending in the Circuit Court of Broward County, Florida. The state subpoenaed DeBock for deposition, but DeBock asserted his Fifth Amend-

ment privilege to refuse to answer questions on the ground that his answers might be used against him in Florida Bar disciplinary proceedings. DeBock contended that the immunization flowing from section 914.04, Florida Statutes (1983), was insufficient to immunize him from Bar disciplinary proceedings; that such protection could only be afforded by the Supreme Court of Florida; and that the burden was upon the state to seek an order of that court immunizing him before the state could compel him to testify. The circuit court agreed with DeBock and entered the order under review, finding that 1) DeBock was entitled to exercise his Fifth Amendment right not to testify without immunity relative to Florida Bar disciplinary proceedings, and 2) the state had the obligation to apply for and obtain a grant of such immunity from the Supreme Court of Florida before seeking to compel DeBock to testify.

The parties concede that by subpoenaing DeBock for deposition in this criminal proceeding, the state has clothed DeBock with use and derivative use immunity via section 914.04, Florida Statutes (1983). *Menut v. State*, 446 So.2d 718 (Fla. 4th DCA 1984). It is also clear that section 914.04 provides no immunity from disciplinary proceedings instituted by The Florida Bar and that such immunity can be provided only by the Supreme Court of Florida. *Ciravolo v. The Florida Bar*, 361 So.2d 121 (Fla. 1978); *State v. Brodski*, 369 So.2d 366 (Fla. 3d DCA 1979). One of the issues here is: who should shoulder the responsibility for seeking such immunity from the supreme court? We hold that a witness in DeBock's position must apply therefor because, when the statutory immunity provided by section 914.04 has been granted by a state attorney, the witness is immunized from criminal prosecution and must testify. The witness cannot, under the Fifth Amendment, refuse to do so because of the potentially adverse use of his testimony in Bar disciplinary proceedings. The reason for this rule is that Bar disciplinary proceedings are remedial, not punitive; they are designed to determine the lawyer's fitness to practice so as to protect the public, not to punish the lawyer in question. *Segretti v. State Bar*, 15 Cal.3d 878, 126 Cal.Rptr. 793, 544 P.2d 929 (1976); *In re March*, 12 Ill.2d 382, 17 Ill. Dec. 214, 376 N.E.2d 213 (1978); *Maryland State Bar Associ-*

ation, Inc. v. Sugarman, 273 Md. 306, 329 A.2d 1 (1974); *In re Connaghan*, 613 S.W.2d 626 (Mo. 1981); *Anonymous Attys. v. Bar Ass'n of Erie Cty.*, 41 N.Y.2d 506, 362 N.E.2d 592, 393 N.Y.S.2d 961 (1977); *In re Daley*, 549 F.2d 469 (7th Cir. 1977). The distinction between criminal prosecution and Bar disciplinary proceedings is nicely explicated in *In re Daley*, 549 F.2d 469, 474-475 (7th Cir. 1977):

Denomination of a particular proceeding as either "civil" or "criminal" is not a talismanic exercise, but rather attaches "labels of convenience," *In re Gault*, 387 U.S. 1, 50, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), and tends to inhibit factual inquiry into the nature of the proceeding itself. The Supreme Court has determined that the "sole concern [of the self-incrimination clause] is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to criminal acts . . .'" *Ullmann, supra*, 350 U.S. at 438-39, 46 S.Ct. at 507, *quoting Boyd v. United States*, 116 U.S. 616, 634, 6 S.Ct. 524, 29 L.Ed. 746 (1886); *accord, Kastigar, supra*, 406 U.S. at 453, 92 S.Ct. 1653. In other words, the privilege against self-incrimination functions as a safeguard against rendering an individual criminally liable or subjecting him to prosecution for commission of a crime through the use of testimony coerced from him. Therefore, a "criminal case," for purposes of the invocation of the Fifth Amendment privilege, is one which may result in sanctions being imposed upon a person as a result of his conduct being adjudged violative of the criminal law.

The essence of state bar disciplinary proceedings, however, is not a resolution regarding the alleged criminality of a person's acts, but rather a determination of the moral fitness of an attorney to continue in the practice of law. Although conduct which could form the basis for a criminal prosecution might also underlie the institution of disciplinary proceedings, the focus is upon gauging an individual's character and fitness, and not upon adjudging the criminality of his prior acts or inflicting punishment for them. As previously stated by this court:

[D]isbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, *sui generis*, and result from the inherent power of courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. *They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministrations of persons unfit to practice. Thus the real question at issue in a disbarment proceeding is the public interest and attorney's right to continue to practice a profession imbued with public trust.*

In re Echeles, 430 F.2d 347, 349-50 (7th Cir. 1970) (citations omitted, emphasis added). See also *Ex parte Wall*, 107 U.S. 265, 288, 2 S.Ct. 569, 27 L.Ed. 552 (1882).

Thus, a clear distinction exists between proceedings whose essence is penal, intended to redress criminal wrongs by imposing sentences of imprisonment, other types of detention or commitment, or fines, and proceedings whose purpose is remedial, intended to protect the integrity of the courts and to safeguard the interests of the public by assuring the continued fitness of attorneys licensed by the jurisdiction to practice law. The former type of proceedings is, in actuality, "criminal" in nature and therefore within the ambit of the Fifth Amendment safeguards against self-incrimination; the latter is not.

A lawyer, just as any other person called as a witness in any proceeding, may properly invoke the Fifth Amendment privilege against self-incrimination if the answer to a question put to him has the tendency to incriminate him, *i.e.*, to subject him to a criminal prosecution. However, a lawyer may not properly invoke the Fifth Amendment privilege against self-incrimination if the answer to a question put to him may result in a Bar disciplinary proceeding but does not have a tendency to incriminate him.

Accordingly, we quash the order under review and remand the cause with instructions that the circuit court direct DeBock to testify pursuant to the state's subpoena or be subject to the contempt powers of the court.

LETTS and WALDEN, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE RE-
HEARING PETITION AND, IF FILED, DISPOSED OF.



APPENDIX C

SUPREME COURT OF FLORIDA

[October 30, 1986]

No. 67,207

CHRISTOPHER DeBOCK,*Petitioner,*

v.

STATE OF FLORIDA,

Respondent.

ADKINS, J.

We have for review a decision by the Fourth District Court of Appeal, *State v. Rendina*, 467 So.2d 734 (Fla. 4th DCA 1985), quashing the trial court order which stated that DeBock was entitled to exercise his fifth amendment right not to testify in the absence of a grant of immunity relative to Florida Bar proceedings. The district court's decision conflicts with *Lurie v. Florida State Board of Dentistry*, 288 So.2d 223 (Fla. 1973), and *Ciravolo v. The Florida Bar*, 361 So.2d 121 (Fla. 1978). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We agree with the trial court and quash the decision of the district court of appeal.

DeBock, an assistant state attorney and member of The Florida Bar, was served with a subpoena issued by the state to appear at a deposition. He was requested to testify in a pending criminal case in which another attorney was accused of offering him unlawful compensation. During the deposition, DeBock asserted his fifth amendment right against self-incrimination and refused to answer questions posed by the state. He feared that the use immunity conferred to him by section 914.04, Florida Statutes (1983), would not extend to a Bar disciplinary proceeding, and he noted that this extended immunity was not

obtained from this Court in accordance with *Ciravolo v. The Florida Bar*, 361 So.2d 121 (Fla. 1978).

The state filed a petition for order to show cause why DeBock should not be held in contempt. The trial court refused to hold DeBock in contempt, finding that DeBock was entitled to exercise his fifth amendment right not to testify without use immunity from Bar discipline. In addition the trial court found that the burden was on the state to apply for and obtain immunity from this Court before seeking to compel DeBock to testify.

On appeal, the district court quashed the trial court's decision and found that because Bar disciplinary proceedings are remedial and not penal in nature, DeBock may not invoke his fifth amendment privilege to prevent his answers from incriminating him in a subsequent disciplinary proceeding. In addition, the district court held that it is DeBock himself, not the state, who is responsible for seeking immunity from this Court.

The district court of appeal's decision conflicts with *Florida State Board of Architecture v. Seymour*, 62 So.2d 1 (Fla. 1952); and *Ciravolo*, which are controlling. DeBock, like the architect in *Seymour*, the dentist in *Lurie* and the attorney in *Ciravolo*, fears that statements he makes when compelled by the state to testify in a criminal trial will be used against him in a subsequent disciplinary proceeding. See also *State ex rel. Vining v. Florida Real Estate Commission*, 281 So.2d 487 (Fla. 1954) (real estate broker). We disagree with the district court's contention that a Bar disciplinary proceeding is remedial in nature. A Bar disciplinary proceeding which could result in revocation of DeBock's privilege to practice law is tantamount to the disciplinary action to revoke an architect's certificate, which we determined was a prosecution to effect a penalty or forfeiture as contemplated by section 914.04, Florida Statutes (1983). *Seymour*. In *Seymour*, on which both *Lurie* and later *Ciravolo* are premised, we held that "a right to earn a living...[is] protected by the immunity statute." 62 So.2d at 3. In the case at bar DeBock's right to earn a living and his privilege to practice law are for all intents and purposes one

and the same. In following this rationale, this Court in *Lurie* held that immunity from prosecution conferred upon a dentist at the time he was compelled to testify included immunity from subsequent administrative proceedings which threatened to revoke his professional license. In furtherance of this theme we found that "to be efficacious in securing testimony of a citizen the immunity extended must be coextensive with all possible governmental penalties and forfeitures, criminal or civil. Persons holding professional licenses cannot be excepted from total immunity protection." 288 So.2d at 226.

In a disciplinary proceeding aimed at disbarring a member of the New York Bar the United States Supreme Court recognized that where the accused attorney asserted his constitutional privilege against self-incrimination and refused to testify, the attorney should "suffer no penalty . . . for such silence." *Spevack v. Klein*, 385 U.S. 511 at 514 (1967), quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The Supreme Court stated further that in this context "penalty" is not restricted to fine or imprisonment, rather it means the imposition of any sanction which makes the assertion of the fifth amendment privilege "costly." 385 U.S. at 515. The Court concluded that the self-incrimination clause extends to lawyers as well as other individuals and "it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it." *Id.* at 514.

One year later, in *Gardner v. Broderick*, 392 U.S. 273, 277 (1968), when comparing a police officer's right against self-incrimination with that of an attorney, the Supreme Court agreed with the premise that "a lawyer could not constitutionally be confronted with Hobson's choice between self-incrimination and forfeiting his means of livelihood."

In *Ciravolo*, this Court found that an attorney also may be granted immunity from disciplinary proceedings, but unlike professionals regulated by statute, the immunity must be obtained from this Court. This holding was premised on the doctrine of separation of powers found in article II, section 3, Florida Constitution, and in article V, section 15 of the constitution which vests exclusive jurisdiction over the discipline of attorneys to this Court.

Now that we have established that Bar disciplinary proceedings are penal in nature, and that this Court may grant use immunity relative to those proceedings, we must decide who shall bear the burden of petitioning this Court for such immunity. Where, as in the case at bar, the state desires to compel testimony of an attorney which may be used against him in a subsequent Bar disciplinary proceeding, we find that the state must bear the burden of obtaining immunity from this Court before it can compel an attorney to testify. After all, it is the state, not the witness, who is interested in the compelled testimony. To hold otherwise and burden only attorney witnesses, unlike other professionals, with the expense of petitioning this Court for use immunity to protect their livelihoods would violate the attorney witness' rights to equal protection under the law.

The only relevant characteristic of the legal profession distinguishing it from other professions is that the other professions are afforded immunity by automatic operation of a statute. We agree with DeBock's argument that this procedural distinction fails to supply a rational basis for requiring only the legal profession to bear the burden and expense of obtaining immunity from this Court. When addressing this issue the United States Supreme Court concluded "[w]e find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others." *Spevack*, 385 U.S. at 516. In addition, in a concurring opinion it was found that "[t]he special responsibilities that he [the attorney] assumes as licensee of the State and officer of the court do not carry with them a diminution, however limited, of his fifth amendment rights." *Id.* at 520 (Fortas, J., concurring). To afford attorney witnesses equal protection under state law, we replace their lack of automatic statutory immunity with immunity from this Court which must be obtained for them by the state.

Once the state makes application to this Court to obtain use immunity for the attorney witness, "where it appears that the greater good of society will be served by granting immunity from disciplinary action to an attorney, we will do so." *Ciravolo*, 361 So.2d at 125.

The decision of the district court of appeal is quashed and the cause remanded to the district court with instructions to further remand to the trial court for reinstatement of its order.

It is so ordered.

BOYD, SHAW and BARKETT, JJ., Concur. EHRLICH, J., Concur in part and dissents in part with an opinion, in which McDONALD, C.J., and OVERTON, J., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE RE-HEARING MOTION AND, IF FILED, DETERMINED.

EHRLICH, J., concurring in part and dissenting in part.

Neither precedent, logic, nor fairness supports the majority's rationale or conclusions. I, therefore, dissent in part.

One initial observation is in order. In cases dealing with professionals under the immunity statute, this Court has a history which in *Ciravolo*¹ Justice England aptly characterized as "checkered." Our vacillation in this area was chronologically explained in *Ciravolo* and, in fact, this Court's "imperfect handling of precedents" was the reason cited by the majority for the ultimate holding in that case. 361 So.2d at 124. Therefore, it is with *Ciravolo* that the analysis of the issues before us must begin.

I agree with the majority that *Ciravolo* holds that a grant of immunity under section 914.04 does not immunize attorneys from bar disciplinary proceedings and I concur with this. I also agree that the underpinning for this holding is based on the separation of powers doctrine and this Court's exclusive jurisdiction over the admission and discipline of attorneys under article V, section 15, Florida Constitution. *Ciravolo*, however, does not answer the issue before us, resting as it does on the accepted proposition that any grants of immunity in bar disciplinary proceedings must come from this Court. It is the majority's perception of how this Court should exercise this power and the implications for the values we seek to enhance and the standards of conduct we demand from attorneys under

¹ *Ciravolo v. The Florida Bar*, 361 So.2d 121, 125 (Fla. 1978) (England, J., concurring in part, dissenting in part).

our authority that causes me to choose a different path from the one the majority chooses to travel.

The first fundamental flaw I find in the majority's reasoning is that bar disciplinary proceedings are penal in nature. While this view may hold superficial creditability for a layman, it appears to me to denigrate one of the foundational purposes supporting the existence of the bar, namely, a determination of an individual's fitness to continue in the practice of law. Inquiries into an attorney's fitness to practice law exist for the protection of the public and the integrity of the courts, not to punish the lawyer. As the district court below correctly recognized, the weight of authority supports the understanding that bar disciplinary proceedings are remedial and not penal in nature. *State v. Redina*, 467 So.2d 734, 736-737 (Fla. 4th DCA 1985). I cannot hope to improve upon the wisdom so beautifully articulated by Justice Cardozo almost seventy years ago:

Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. Whenever the condition is broken, the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment.

In Re Rouss, 221 N.Y. 81, 84-85, 116 N.E. 782, 783 (1917) (citations omitted).

In *The Florida Bar v. Massfeller*, 170 So.2d 834 (Fla. 1964), this Court recognized that section 932.29, Florida Statutes, the forerunner of section 914.04, Florida Statutes, had no applicability to disciplinary proceedings of members of The Florida Bar and aligned itself with those states and cases, including *In Re Rouss*, that held immunity statutes similar to

the one in question do not extend to disciplinary proceedings by courts of members of the bar. While we endeavor here to distinguish *Massfeller* and *Ciravolo*, this Court has never receded from *Massfeller*, and I find the reasoning articulated there to ring as true today as it did over two decades ago when written and published. *Massfeller* involved a circuit court judge's inquiry into the alleged misconduct of an attorney practicing in his circuit. We recognized that this inquiry was only conducted to determine the nature and gravity of the attorney's misconduct. We rejected the argument that such an inquiry was a "criminal investigation," and thus within the purview of the immunity statute, because the proceeding before the circuit court was not directed towards a violation of any criminal statute. 170 So.2d at 838. I fail to see how the nature of the circuit court inquiry involved in *Massfeller* differs from bar disciplinary proceedings, both being conducted solely to inquire into the fitness of an attorney to practice law and not to inquire into violations of the criminal law.

In my view, the majority has simply failed to recognize this crucial distinction and has, therefore, reached an erroneous conclusion about the nature of bar disciplinary proceedings. None of the cases cited by the majority supports its conclusion in this respect and the reliance on *Spevack v. Klein*, 385 U.S. 511 (1967), is simply misplaced. All that case holds is that an attorney may not be disbarred solely because he invoked his fifth amendment right to silence in a bar disciplinary proceeding. That is not the issue before us.

The issue that is presented here is the scope of immunity granted by section 914.04. The immunity granted by the statute is use immunity which the United States Supreme Court has held need be only as broad as the fifth amendment protection against self-incrimination. *Kastigar v. United States*, 406 U.S. 441 (1972). The concern of the fifth amendment is the danger to a witness who is forced to give testimony leading to the infliction of "penalties affixed to . . . criminal acts." *Boyd v. United States*, 116 U.S. 616, 634 (1886). As Justice Frankfurter explained in *Ullmann v. United States*, 350 U.S. 422, 439 (1956): "Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases."

It is with this understanding that the scope of section 914.04 must be assessed. This section protects a witness from the state's using the immunized testimony as a basis for *criminal prosecution* for the acts testified about. The petitioner sub judice is fully protected from the infliction of any criminal prosecution based on his testimony. In my view, this is the extent of the protection offered by the statute. This interpretation, contrary to the majority's concern, will not undermine the ability of prosecutors to secure the testimony of a citizen. The authority cited for the majority's questionable proposition is *Lurie v. Florida State Board of Dentistry*, 288 So.2d 223 (Fla. 1973), which interpreted the terms "penalty and forfeiture" contained in the immunity statute as applied to *nonlawyer* professionals (i.e., those under the authority of the executive branch of our government). I submit that *Lurie* does not and cannot control the issues here.

In *Ciravolo* we limited *Lurie* because of the doctrine of separation of powers: the state attorney has no authority to confer immunity from bar disciplinary proceedings because such immunity may only come from this Court. This is the extent of the controlling effect of *Ciravolo* as applied to the case before us.

This squarely presents what I consider to be the second fundamental flaw in the majority's reasoning, which is the procedure mandated, ostensibly based on *Lurie* and *Ciravolo*.

The majority blithely asserts that DeBock's right to earn a living and his privilege to practice law are synonymous. While acknowledging that this statement was made in order to buttress the erroneous idea that bar disciplinary proceedings are penal, I find it illustrative of a deeper and more disturbing misconception. Equally disturbing is the majority's statement that "[t]he only relevant characteristic of the legal profession distinguishing it from other professions is that the other professions are afforded immunity by automatic operation of a statute." Slip op. at 4. These two statements coupled with the majority's incredible equal protection discussion manifest a tragic insensitivity to the role of the legal profession in our society.

There is no right to practice law. It is a privilege which is subject to revocation for good cause. An attorney has no vested right, in the property sense of that term, to practice law. The ethical standards required to remain an attorney in good standing are set forth in detail in the Integration Rule and the Code of Professional Responsibility adopted by this Court. An attorney has a "right" to practice law so long as his fitness comports with these standards.²

The majority alleges that the only relevant distinction between attorneys and other professionals is the automatic operation of the statute and concludes that equal protection requires the state obtain immunity for an attorney from bar disciplinary proceedings.

The only response possible to these assertions is that attorneys *are* different and it has been held sacrosanct for centuries that an attorney is held to higher ethical standards than exist in the marketplace or in other professions. Article V, section 15 of the Florida Constitution manifests the fact that attorneys are not treated like any other professionals. It can be argued that in *Lurie* we took the low road and missed an opportunity to allow professions regulated by the executive branch to raise the standards required of their members. In *Ciravolo* we recognized that it was this Court that must decide when and how an immunized attorney may also gain immunity from bar disciplinary proceedings. What procedure would be required was left open. Today we miss another opportunity to reaffirm the idea that *higher ethical standards* are required of

² By finding DeBock's right to make a living and his right to practice law identical, the majority has erroneously presupposed that should DeBock not be granted bar immunity, he will lose his livelihood. Even if disbarment were to ensue in this case, DeBock could again become a member of the bar once he has complied with the rules for readmission. Violating any of the numerous provisions of the Integration Rule or the Code of Professional Responsibility could result in discipline ranging from a private reprimand to disbarment. No discipline, even disbarment, is permanent enough to be characterized as the loss of the right to make a living. Under the majority's reasoning, an attorney who has engaged in an activity which requires that he or she receive immunity from criminal prosecution (presumably a relatively serious violation of the Code) will not have to testify unless and until he has received disciplinary immunity from this Court, despite the fact that the state attorney has uncovered the attorney-witness's involvement in an act that is by its nature relevant to an attorney's fitness to practice *law*.

members of the third branch of government. Attorneys are held to a higher ethical standard because of the unique role they play as officers of the court. Fidelity to truth and honesty are demanded of attorneys for the protection of the public who must place their trust, property and liberty-and at times even their lives in members of the bar. The continued integrity of our system of justice demands the same dedication to truth and honesty. Even the *appearance* of impropriety by an attorney raises a question about his or her fitness to practice law. Once the appearance of impropriety exists, the bar is mandated to begin an inquiry into the attorney's conduct.

These considerations lead me to conclude that, once an attorney must be granted immunity from criminal prosecution in exchange for his testimony, the appearance of impropriety exists. The immunized attorney's fitness to practice law is thus called into question and it should be his or her burden to come to this Court and persuade us that the good of society will be served by granting immunity from a bar inquiry. The state attorney's role should be ended once immunity from criminal prosecution is granted. Burdening the state attorney with the duty of coming to this Court on behalf of an attorney whose character has been called into question serves no positive purpose. Instead, it makes the state attorney's task of seeking justice more cumbersome and prohibits the bar from carrying out its duty. I perceive no countervailing benefits which could justify the majority's rationale and am fearful that it will only denigrate our honorable profession.

This Court should heed its own wisdom enunciated in *Massfeller* and approve the well-reasoned decision of the district court.

MCDONALD, C.J. and OVERTON, J., Concur.

1d

APPENDIX D

SUPREME COURT OF FLORIDA

Thursday, July 16, 1987

Case No. 67,207

CHRISTOPHER DEBOCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

The opinion filed in this case on October 30, 1986, is withdrawn, and the following opinion dated July 16, 1987, is substituted in lieu thereof.

JB

cc: Clyde L. Heath, Clerk
Hon. Harry G. Hinckley, Jr., Judge
David R. Damore, Esquire
David K. Miller, Esquire
Penny H. Brill, Esquire
John F. Harkness, Jr., Esquire
John T. Berry, Esquire
John A. Boggs, Esquire

SUPREME COURT OF FLORIDA

No. 67,207

CHRISTOPHER DEBOCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON REHEARING

[July 16, 1987]

EHRlich, J.

We have for our review *State v. Rendina*, 467 So.2d 734 (Fla. 4th DCA 1985). We have jurisdiction pursuant to article V, section 3(b)(3) and article V, section 15, Florida Constitution, and approve the decision of the district court below.

The petitioner, DeBock, was served with a subpoena by the state attorney's office for the Seventeenth Judicial Circuit. DeBock's testimony was sought in connection with criminal charges pending against Richard F. Rendina, an attorney, for offering unlawful compensation to DeBock while DeBock was an assistant state attorney. DeBock asserted his fifth amendment privilege and refused to answer questions at a deposition, contending that the immunity flowing from section 914.04, Florida Statutes (1983), was insufficient to immunize him from bar disciplinary proceedings. DeBock alleged that immunity from bar disciplinary proceedings could only come from this Court and the state had the burden of obtaining such immunity before DeBock could be required to testify. The trial court agreed with DeBock and entered an order finding that he was entitled to invoke his fifth amendment privilege until being

granted immunity from bar proceedings, and that the state had to obtain this immunity for him before DeBock could be compelled to testify in the criminal case.

The district court reversed, holding that the witness seeking immunity from bar discipline is the one who has the burden of obtaining it from this Court. The district court reasoned that section 914.04 immunizes a witness solely from criminal prosecution and since bar disciplinary proceedings are remedial and not penal, the immunized witness cannot invoke his fifth amendment privilege and refuse to testify in a criminal case because of the "potentially adverse use of his testimony in bar disciplinary proceedings." 467 So.2d at 736.

DeBock petitioned this Court for review, alleging that the district court's opinion was in conflict with our decision in *Ciravolo v. The Florida Bar*, 361 So.2d 121 (Fla. 1978), which dealt with two attorneys who had been granted immunity from criminal prosecution pursuant to section 914.04 and who claimed that this immunity also extended to bar disciplinary proceedings. DeBock raises numerous issues here. He claims first that bar disciplinary proceedings are penal and, therefore, in order to protect his fifth amendment privilege against compulsory self-incrimination, the grant of statutory immunity must also extend to bar disciplinary proceedings. In support of this contention, DeBock's second claim is that *Ciravolo* left intact previous decisions of this Court which held that a grant of statutory immunity to a non-attorney witness also immunized the witness from professional license revocation proceedings. According to DeBock, these prior cases support his position that professional disciplinary proceedings are considered penal in Florida. DeBock's third claim is that given our holdings in these prior cases, equal protection demands that an attorney-witness granted statutory immunity to be treated the same as an immunized non-attorney witness. We reject each of these suggestions. Because DeBock's claims are all at least partially based on an erroneous view of our decision in *Ciravolo*, it is with that case that our discussion begins.

Two attorneys, Ciravolo and Feldman, had been subpoenaed to appear before a grand jury; both were granted immunity pursuant to the provisions of section 914.04. Counsel

for both the state and the attorneys were of the opinion that the statutory grant of immunity extended to bar disciplinary proceedings, and the attorneys testified before the grand jury pursuant to this understanding. The Florida Bar subsequently instituted disciplinary proceedings against the attorneys based upon the transactions testified to before the grand jury. Ciravolo and Feldman sought a writ of prohibition from this Court in order to stop the bar from taking any disciplinary action. 361 So.2d at 122.

After discussing several of our prior decisions dealing with the immunity statute, *Lurie v. Florida State Board of Dentistry*, 288 So.2d 223 (Fla. 1973), *Headley v. Baron*, 228 So.2d 281 (Fla. 1969), *Florida Bar v. Massfeller*, 170 So.2d 834 (Fla. 1964), and *Florida State Board of Architecture v. Seymour*, 62 So.2d 1 (Fla. 1952), we concluded that counsel for the state and the attorneys had justifiably relied on our "unfortunate" reference to attorneys in *Lurie* which had suggested that a grant of immunity to an attorney would also extend to bar disciplinary matters. Therefore, we held:

Since the testimony given in this case was predicated on a justifiable interpretation of this court's strong language in *Lurie*, and the court's imperfect handling of precedents, we are bound by the understanding reached by counsel in this case.

361 So.2d at 124. We explicitly receded from the unfortunate reference to attorneys in *Lurie*, and recognized that because of the separation of powers doctrine and this Court's exclusive jurisdiction over attorneys pursuant to article V, section 15 of the Florida Constitution, a state attorney under the executive branch of government had no authority to confer immunity on an attorney-witness from bar discipline; such immunity could only come from this Court. *Id.* at 124-125.

DeBock's first claim, that bar discipline is penal and therefore, that the grant of statutory immunity must also extend to a bar inquiry in order to protect his fifth amendment privilege, is incorrect. Our decision in *The Florida Bar v.*

Massfeller is controlling.¹ In *Massfeller* we recognized not only the inherent power of a court to discipline an attorney, but also rejected the idea that an inquiry into an attorney's fitness to practice law is penal, *i.e.*, is designed to punish an attorney. This Court explicitly embraced the reasoning of (then) Judge Cardozo in *In re: Rouss*, 221 N.Y. 81, 84-85, 116 N.E. 782, 783 (N.Y. 1917), *cert. denied*, 246 U.S. 661 (1918):

Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. Whenever the condition is broken the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment. (citations omitted).

170 So.2d at 839. We reaffirm here our holding in *Massfeller* that bar disciplinary proceedings are remedial, and are designed for the protection of the public and the integrity of the courts. An attorney as an officer of the Court and a member of the third branch of government occupies a unique position in our society. Because attorneys are in a position where members of the public must place their trust, property and liberty, and at times even their lives, in a member of the bar, society rightfully demands that an attorney must possess a fidelity to truth and honesty that is beyond reproach. When an attorney breaches this duty, the public is harmed. Not only is the individual citizen harmed by the unethical practitioner, all of society

¹ This Court in *Ciravolo* distinguished *Massfeller* because *Massfeller* was not compelled to testify in a criminal proceeding pursuant to the immunity statute. 361 So.2d at 124. Regardless of this distinction, our holding in *Massfeller* concerning the nature of bar disciplinary proceedings is dispositive of DeBock's claim that such proceedings are "penal." *Massfeller* is still good law as was recognized both by Justice Adkins, *id.* at 125, and by Justice England, *id.* at 125 and 126, n. 2, in *Ciravolo*.

suffers when confidence in our system of law and justice is eroded by the unethical conduct of an officer of the Court. To protect the public the bar is mandated to inquire into an attorney's conduct when even the *appearance* of impropriety exists. For these reasons, the vast weight of judicial authority recognizes that bar discipline exists to protect the public, and not to "punish" the lawyer.²

DeBock's second and third claims must logically be dealt with together. DeBock alleges that *Ciravolo* left intact our prior decisions, specifically *Lurie*, which held that a grant of immunity from criminal prosecution extends to professional license revocation proceedings. From this premise DeBock argues that equal protection demands that an attorney be treated the same as non-lawyer professionals. We reject both suggestions.

First, we point out that the underpinnings of both *Lurie* and *Seymour*, upon which DeBock relies, were effectually gutted when section 914.04 was amended by 82-393, section 1, Laws of Florida (1982). Prior to the amendment, the statute provided not only for transactional immunity "which accords full immunity from [criminal] prosecution for the offense to which the compelled testimony relates," *Kastigar v. United States*, 406 U.S. 441, 453 (1972), but also provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify . . ." § 914.04, Fla. Stat. (1981) (emphasis added). As interpreted by this Court,³ a grant of transactional immunity under the prior statute provided that once a witness was immunized, *no* penalty would follow on account of *the transaction* testified about; we specifically held in *Seymour* that whether the penalty was criminal or civil was immaterial. 62 So.2d at 3.

²We note in passing that many remedial statutes, designed to benefit or protect the public, have "penal" aspects; this does not alter their basic purpose and transform them into penal measures. See, e.g., Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969) (Sunshine Law).

³In *Headley v. Baron*, 228 So.2d 281 (Fla. 1969), we overruled *Seymour* and held that the statute only applied to criminal penalties and forfeitures. In *Lurie*, we overruled *Headley* and resurrected *Seymour*. 288 So.2d at 228.

However, the 1982 amendment narrowed the scope of the grant and the statute now provides for only use and derivative use immunity. The Supreme Court in *Kastigar* held that this is as broad as is constitutionally required to encompass the fifth amendment's protection against compulsory self-incrimination. 406 U.S. at 453.⁴ By its plain terms, section 914.04 now is limited strictly to "any criminal investigation or proceeding."

Even accepting *arguendo* DeBock's assertion that *Ciravolo* left intact *Lurie* and *Seymour*, the 1982 amendment to section 914.04 now renders *Lurie* and *Seymour* inapposite. Since bar disciplinary proceedings are not penal, the grant of use and derivative use immunity conferred on DeBock extends only to the "criminal investigation or proceeding" concerning Rendina. Therefore, strictly under an analysis of the applicable statutory provision, DeBock had no right *sub judice* to invoke his fifth amendment privilege until immunized from bar discipline.

However, regardless of this statutory analysis, DeBock's reading of *Ciravolo* is incorrect. We *explicitly* limited the "unfortunate" reference to lawyers made in *Lurie*, and held that a grant of immunity under section 914.04 does not immunize an attorney from bar disciplinary proceedings. 361 So.2d at 124.

Still relying on the validity of *Lurie* and *Seymour* DeBock raises an equal protection claim and states that there is "simply no rational basis for applying constitutional guarantees differently to the loss of the license of a certified public accountant, for example, than to the loss of a lawyer's license." As stated, the immunity statute involved in *Lurie* and *Seymour* has been significantly narrowed, thus bringing the continued validity of those cases into doubt. Further, in order to dispell the implication nascent in DeBock's argument that he somehow has a "right" to practice law, we point out what should be obvious to all members of the bar: "[a] license to practice law confers

⁴ The Supreme Court held that use and derivative use immunity "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect," 406 U.S. at 453 (emphasis in original), and "it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* at 460.

no vested right to the holder thereof, but is a conditional privilege which is revocable for cause." Rule 3-1.1, Rules Regulating The Florida Bar.

DeBock further argues, in support of his equal protection claim, that *Ciravolo* cannot be read to set forth different standards for attorneys than for other regulated professionals. Not only did we explicitly limit *Lurie*'s rationale as it applied to attorneys, our opening paragraph in *Ciravolo* belies DeBock's argument: The question we considered in that case was "whether or not evidence given by an attorney, following a grant of immunity under section 914.04, Florida Statutes (1975), may be used against him in a disciplinary proceeding brought by The Florida Bar;" we answered this question in the *affirmative*. 361 So.2d at 121.

The 1975 version of section 914.04 at issue in *Ciravolo* provided for the broad grant of transactional immunity and, as stated, extended to any penalty, whether civil or criminal. By our answer to the question presented in *Ciravolo* we recognized that an immunized attorney's testimony in a criminal proceeding *could* be used in a bar inquiry. This clearly sets forth the proposition that attorneys can be held to different standards than other regulated professions. The reasons cited above to explain why bar proceedings are designed to protect the public is also a "rational basis" for holding attorneys to different standards: the unique role of attorneys as officers of the court mandates that attorneys be held to the highest of ethical standards. This difference has been recognized by centuries of jurisprudential thought and is manifested in article V, section 15 of our constitution.

Relying on our separation of powers holding in *Ciravolo*, DeBock's final argument is that the burden is on the state to seek from this Court bar immunity for an attorney-witness. We reject this suggestion. In *Ciravolo* we held that an immunized attorney may be granted immunity from bar disciplinary proceedings by order of this Court, "[w]here it appears that the greater good to society will be served by granting immunity from disciplinary action to an attorney..." Id. at 125. Who would have the burden of obtaining such immunity from this

Court was not explicitly addressed in *Ciravolo*. However, our holdings here and in *Ciravolo* that the immunity conferred by 914.04 does not extend to bar disciplinary proceedings because they are remedial, not penal, and our recognition in *Ciravolo* that a state attorney is powerless to interfere with this Court's exclusive jurisdiction over members of the bar, easily leads us to conclude that it is the attorney seeking bar immunity who must so persuade this Court. As we stated in *Ciravolo*:

The court is concerned about the practice of law by those involved in wrong doings of a criminal nature, but, we are also mindful that this court and the profession should not place a stumbling block in the path of the citizens of this state who strive mightily to uncover and rid our communities of criminal acts.

Id. at 125. It would not only be inconsistent with our separation of powers concerns to place this burden on a state attorney, it would also needlessly "place a stumbling block in the path" of those whose duty is to investigate and prosecute criminal wrong doing.

Once immunity was granted to DeBock pursuant to section 914.04, he was fully protected from having his testimony used against him in any criminal proceeding. That is the extent of both the statute's reach and the fifth amendment's privilege against compulsory self-incrimination. Should DeBock now refuse to testify in the criminal proceeding below he, like any other similarly situated witness, can be held in contempt of court.

Accordingly, we approve the decision of the district court below.

It is so ordered.

MCDONALD, C.J., and OVERTON, SHAW and GRIMES, JJ.,
Concur.

BARKETT, J., Dissents with an opinion, in which KOGAN, J.,
Concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE RE-
HEARING MOTION AND, IF FILED, DETERMINED.

BARKETT, J., dissenting.

I dissent. I cannot agree with the premise from which the majority's conclusion derives. To say that bar disciplinary proceedings are remedial in order to protect the public and are not penal in nature is pure semantic tomfoolery. It totally ignores the numerous cases which have imposed discipline when the conduct involved has no connection with the protection of the public, e.g. in cases where a felony conviction *automatically* results in discipline without any analysis of the specific crime as it relates to the protection of the public.

I agree, rather, with the United States Supreme Court which has recognized that where the accused attorney asserted his constitutional privilege against self-incrimination and refused to testify, the attorney should "suffer no penalty . . . for such silence." *Spevack v. Klein*, 385 U.S. 511, 514 (1967) (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)). The Supreme Court stated further that in this context "penalty" is not restricted to fine or imprisonment, rather it means the imposition of any sanction which makes the assertion of the fifth amendment privilege "costly." 385 U.S. at 515. The Court concluded that the self-incrimination clause extends to lawyers as well as other individuals and "it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it." *Id.* at 514. In *In re Ruffalo*, 390 U.S. 544, 550 (1968), the Court said "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer." In *Gardner v. Broderick*, 392 U.S. 273, 277 (1968), when comparing a police officer's right against self-incrimination with that of an attorney, the Supreme Court agreed with the premise that "a lawyer could not constitutionally be confronted with Hobson's choice between self-incrimination and forfeiting his means of livelihood."

Moreover, the United States Supreme Court ruling in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 28 (1985), has cast considerable doubt on this Court's prior

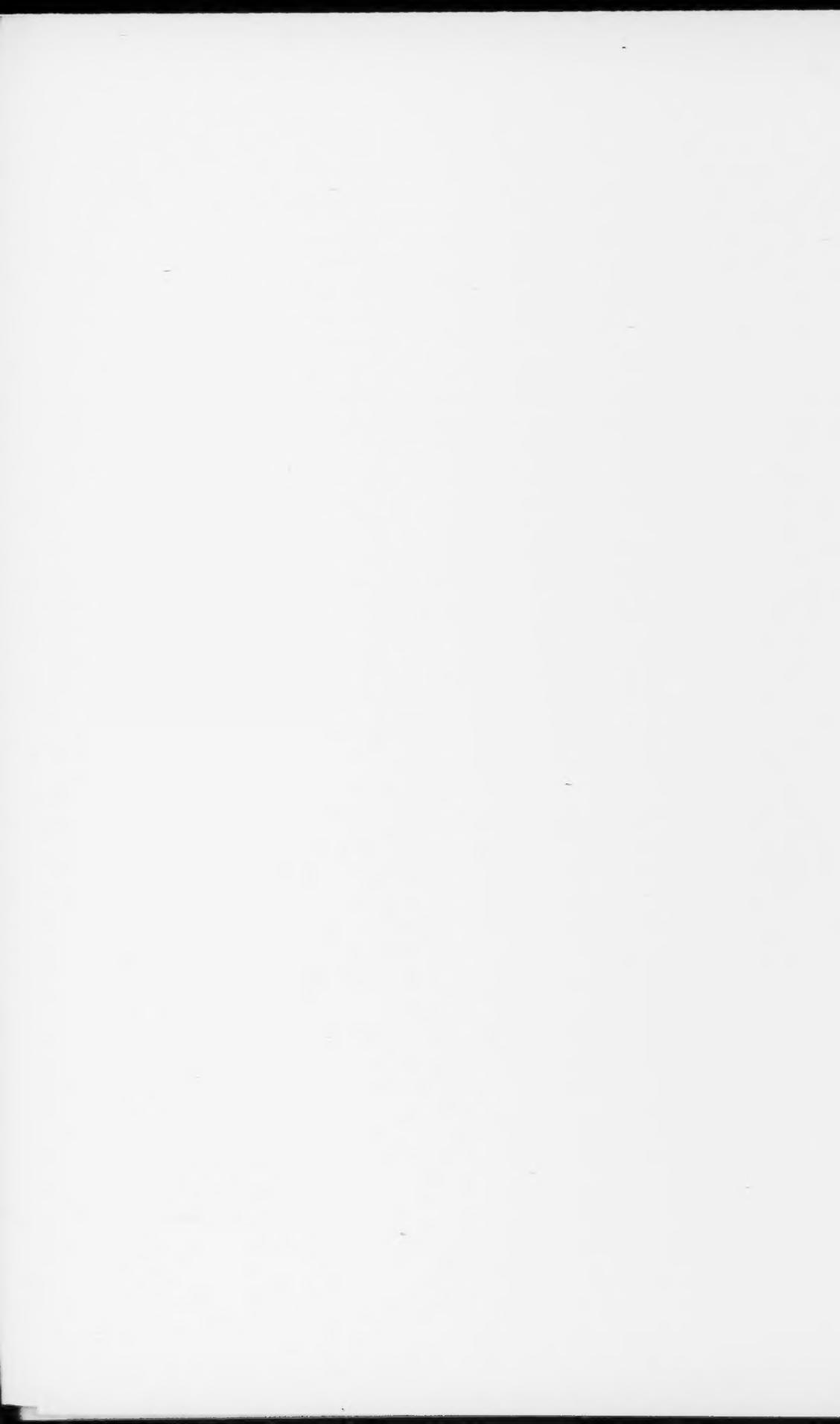
statements that the opportunity to practice law is not a right protected by the Constitution:

The lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a "fundamental right."

Although *Piper* used this rationale to void a residency requirement restricting the practice of law to those who live within a state, this dictum nonetheless suggests that the United States Supreme Court is starting to view the practice of law in a far different light than that suggested by the majority. If the opportunity to practice law indeed is a "fundamental right," I see no justification for the majority's holding that bar disciplinary proceedings are not penal in nature. Any proceeding that may strip someone of a fundamental right by definition is "penal" and therefore subject to all the strictures of the fifth amendment.

I therefore must respectfully dissent.

KOGAN, J., Concur.



APPENDIX E

In The Supreme Court of Florida

Friday, September 4, 1987

Case No. 67,207

District Court of Appeal,
4th District—No. 84-2632

CHRISTOPHER DEBOCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On consideration of the motion for rehearing filed by attorney for petitioner, and replies thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

MCDONALD, C.J., OVERTON, EHRLICH, SHAW and GRIMES, JJ.,
Concur.

BARKETT and KOGAN, JJ., Dissent.

C

cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Harry G. Hinckley, Jr., Judge

David R. Damore, Esquire
David K. Miller, Esquire
John F. Harkness, Jr., Esquire
John T. Berry, Esquire
John A. Boggs, Esquire
Penny H. Brill, Esquire
Steven Russell, Esquire
Alexander M. Siegel, Esquire

A True Copy

TEST:

Sid J. White
Clerk Supreme Court



APPENDIX F

In The Supreme Court of Florida

Wednesday, September 9, 1987

Case No. 67,207

District Court of Appeal,
4th District—No. 84-2632

CHRISTOPHER DEBOCK,

Petitioner,

vs.

STATE OF FLORIDA.

Respondent.

The motion for stay filed by attorney for petitioner is granted and proceedings in this Court, the District Court of Appeal, Fourth District, and the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, are hereby stayed to and including October 5, 1987, to allow petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

C

cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Harry G. Hinckley, Jr., Judge

David R. Damore, Esquire
David K. Miller, Esquire
John F. Harkness, Jr., Esquire
John T. Berry, Esquire
John A. Boggs, Esquire
Joy Shearer, Esquire
Steven Russell, Esquire
Alexander M. Siegel, Esquire

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

87-535 (2)

Supreme Court, U.S.
FILED

DEC 21 1987

JOSEPH F. SPANIOLO, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

CASE NO. _____

October Term, 1987

CHRISTOPHER DeBOCK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

ROBERT A BUTTERWORTH
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Counsel for Respondent.

2978

2

QUESTION PRESENTED

WHETHER THE OPINION BELOW, WHICH
INTERPRETED AN AMENDEMNT TO
FLORIDA'S IMMUNITY STATUTE IN A
MANNER CONSISTENT WITH FEDERAL
CONSTITUTIONAL PRINCIPLES,
RAISES A FIFTH ADMENDMENT OR
EQUAL PROTECTION ISSUE WORTHY OF
CERTIORARI CONSIDERATION?

(Petitioner's questions re-
stated and consolidated).

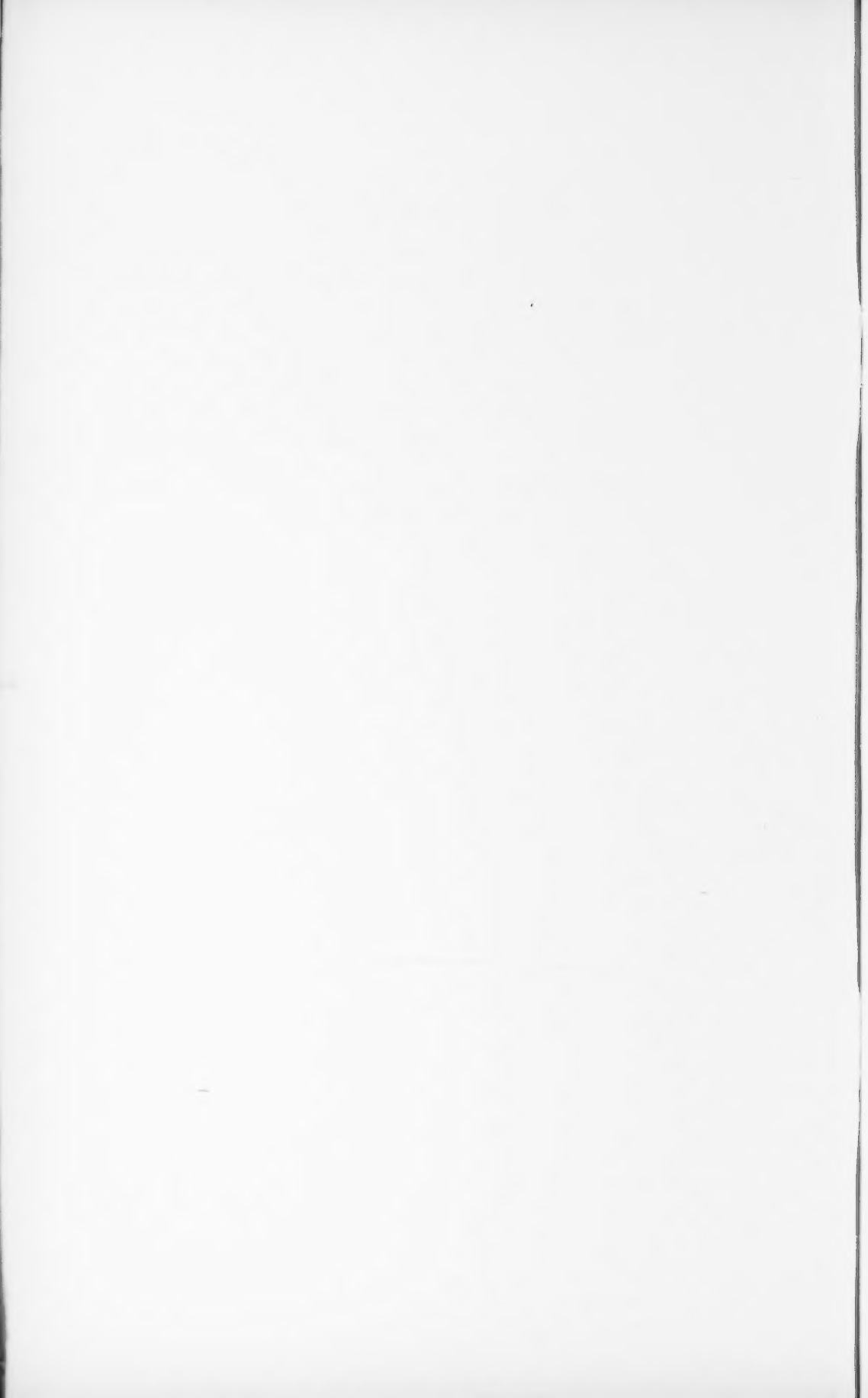


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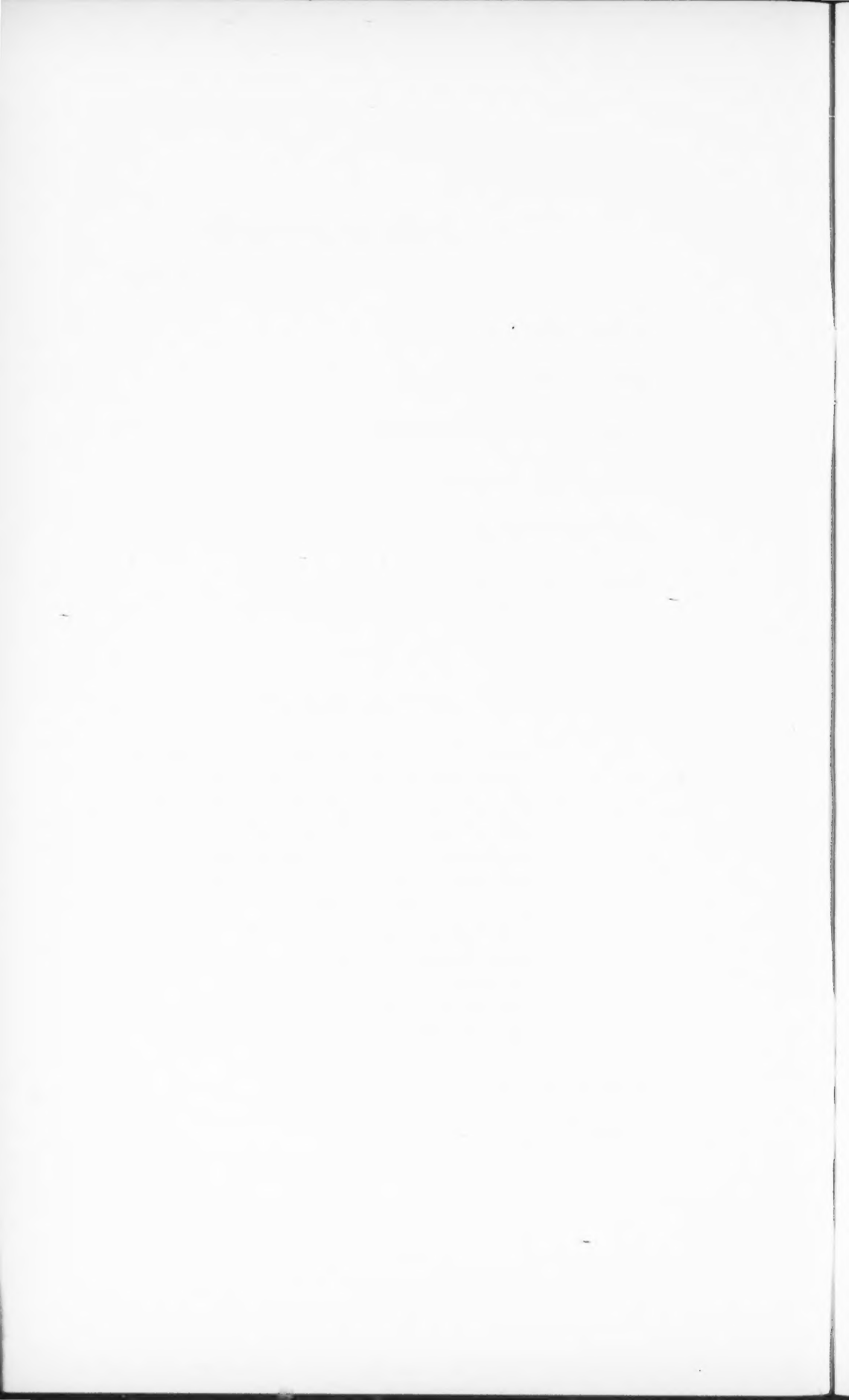
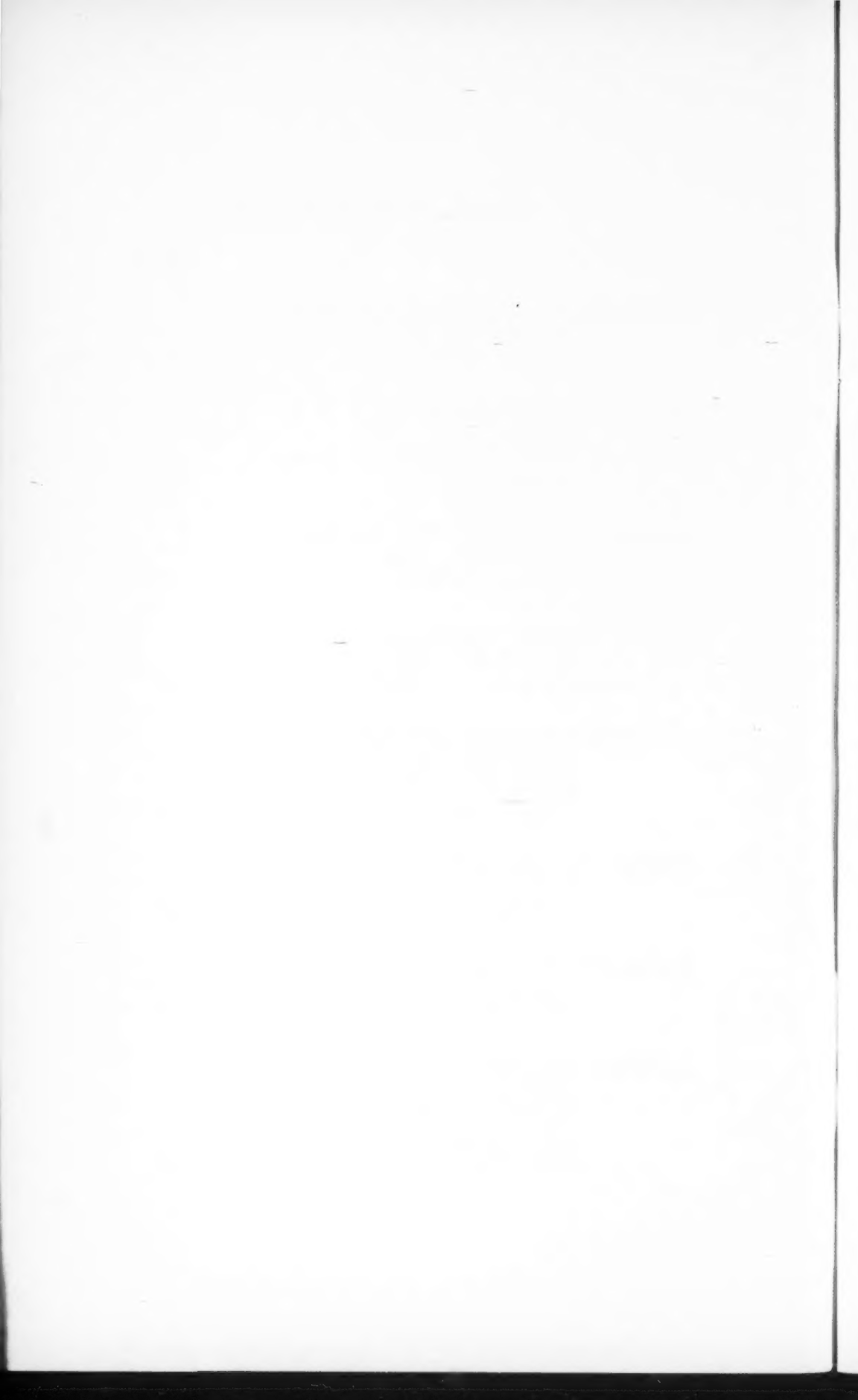


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OPINIONS BELOW

The Respondent accepts the Petitioner's statement, but would add the following citations: The opinion of the Fourth District Court of Appeal is reported as State v. Rendina, 467 So.2d 734 (Fla. 4th DCA 1985). The opinion rendered by the Florida Supreme Court is reported as DeBock v. State, 512 So.2d 164 (Fla. 1987).

JURISDICTION

The Respondent accepts the Petitioner's
Statement.

CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by the Petitioner, Respondent adds the Florida Immunity Statute as it existed prior to the 1982 amendment. The 1975 Statute analyzed in Ciravolo v. the Florida Bar, 361 So.2d 121 (Fla. 1978), provided:

Witnesses; person not excused from testifying in certain prosecutions on ground testimony might incriminate him; immunity from prosecution.--No person, having been duly served with a subpoena or subpoena duces tecum, shall be excused from attending and testifying or producing any book, paper, or other document before any court having felony trial jurisdiction, grand jury, or state attorney, upon investigation, proceeding, or trial for a violation of any of the criminal statutes of this state upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him

to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

STATEMENT OF THE CASE

Richard F. Rendina, an attorney, was charged by an information filed June 21, 1984, with the felony offense of offering a public servant unlawful compensation or reward for official behavior. In conjunction with the prosecution of Rendina, Christopher DeBock, who was at the time of the charged incident an assistant state attorney, was served with a subpoena to appear at a deposition. DeBock appeared but refused to testify, asserting his Fifth Amendment right against self incrimination.

The prosecuting attorney sought to have DeBock held in contempt, because by operation of applicable Florida law, DeBock had received immunity from criminal prosecution and could thus no longer assert a Fifth Amendment privilege. DeBock took the position that his testimony could not be compelled unless the State obtained

immunity from Bar disciplinary proceedings from the Florida Supreme Court as well.

The trial court entered an order declining to hold DeBock in contempt. (Petitioner's Appendix A). The State filed a Petition for Common Law Certiorari in the Fourth District Court of Appeal of Florida. That Court reversed, and held that DeBock would have to seek Bar immunity for himself, because §914.04 Fla.Stats. (1983) immunizes a witness solely from criminal prosecution. State v. Rendina, 467 So.2d 734 (Fla. 4th DCA 1985). (Petitioner's Appendix B).

DeBock sought review in the Florida Supreme Court. Although initially the Court reversed the intermediate court's decision (Petitioner's Appendix C), on rehearing the Court affirmed. DeBock v. State, 512 So.2d 164 (Fla. 1987). (Petitioner's Appendix D). The Court held a grant of immunity

pursuant to §914.04 Fla. Stats. (1983), is not required under the Fifth Amendment privilege to extend to a bar inquiry. Noting that the statute now gives only use immunity, whereas it formerly provided transactional immunity so that no penalty would follow, civil or criminal, the Court held that the only immunity given any professional now is immunity from criminal prosecution. There thus can be no equal protection argument because all professionals are treated equally. Alternatively, the Court noted that there are rational reasons for treating attorneys differently from other professionals, due to their unique role as officers of the Court.

The Court granted stays of proceedings in both this case and the Rendina prosecution through October 5, 1987, to enable DeBock to seek any further stay from this

Court. This Court denied DeBock's stay application on November 2, 1987. Subsequently, Richard Rendina entered a plea of nolo contendere to a lesser charge. At this time, Respondent does not suggest that the present case is moot because there is an ongoing investigation concerning other allegations regarding Rendina, and DeBock's testimony is still being sought in that investigation.

REASONS FOR DENYING THE WRIT

THE OPINION BELOW INTERPRETED AN AMENDMENT TO FLORIDA'S IMMUNITY STATUTE IN A MANNER CONSISTENT WITH FEDERAL CONSTITUTIONAL PRINCIPLES SO THAT NEITHER A CERT-WORTHY EQUAL PROTECTION NOR A FIFTH AMENDMENT ISSUE HAS BEEN RAISED; FURTHERMORE, THE RESULT REACHED IN THE COURT BELOW WAS CORRECT.

DeBock asserts the Florida Supreme Court has found bar disciplinary proceedings remedial for Fifth Amendment purposes while all other disciplinary proceedings are penal, thus denying equal protection to lawyers. Not so. The Florida Supreme Court has decided a question of state law, by determining that the 1982 amendment to §914.04 Fla. Stats. (1983) has narrowed the scope of immunity so it now provides only for use and derivative use immunity. This is all that is required by the Fifth Amendment, for as

this Court held in Kastigar v. United States, 406 U.S. 441 (1972), a grant of use and derivative use immunity is co-extensive with the scope of the privilege against self-incrimination and therefore is sufficient to compel testimony over a claim of privilege.

Prior to the 1982 amendment, the Florida immunity statute provided broader protection than the Fifth Amendment demands. For example, the 1975 version of the statute, analyzed in Ciravolo v. The Florida Bar, 361 So.2d 121, 122-123 (Fla. 1978), provided, "No person, having been duly served with a subpoena or subpoena duces tecum, shall be excused from attending and testifying . . . upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or subject him to a penalty or for-

feiture, but no person shall be prosecuted or subjected to a penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence . . ." Thus, the Ciravolo decision, consisted with prior case law interpreting the immunity statute,¹ found that it referred to more than criminal prosecution, and protected a person compelled to testify from any "penalty or forfeiture" for those matters concerning which the testimony or evidence is produced.

In 1982, the Florida legislature amended the statute so that it now provides "no testimony so given or evidence so produced [compelled by a subpoena] shall be

¹ See, e.g., Lurie v. Florida State Board of Dentistry, 288 So.2d 223 (Fla. 1973); Florida State Board of Architecture v. Seymour, 62 So.2d 1 (Fla.1952).

received against [the witness] upon any criminal investigation or proceeding." The Florida Supreme Court pointed out this statutory change in its decision below, and observed "by its plain terms, section 914.04 now is limited strictly to 'any criminal investigation or proceeding'." DeBock v. State, 512 So.2d 164, 167 (Fla. 1987).

Therefore, the amendment to §914.04 Fla. Stats. eliminated any distinction between the rights of lawyers and the rights of other professionals as to the consequences of receiving statutory immunity. As a result of the amendment, neither lawyers nor other licensed professionals have any claim to automatic immunity from use of their compelled testimony in disciplinary proceedings by virtue of receiving immunity under the statute. There is no federal equal

protection issue arising from these circumstances.

Nevertheless, DeBock asserts the equal protection question can be addressed because "federal constitutional law alone requires that the Fifth Amendment privilege -- and its counterpart, immunity -- be fully applicable to such [professional disciplinary] proceedings". (Petition, p. 15). Debock's argument in this regard is without merit. The Fifth Amendment by its own language is limited to criminal prosecutions: "nor shall be compelled in any criminal case to be a witness against himself." This Court has rejected claims that the Fifth Amendment privilege applies in civil proceedings for penalty or forfeiture. In United States v. Ward, 448 U.S. 242, 248 (1980), it was stated:

The distinction between a civil penalty and a criminal penalty is of some constitutional import. The self-incrimination clause of the Fifth Amendment, for example, is expressly limited to "any criminal case."

Likewise, in Garner v. United States, 424 U.S. 648, 655, (1976), the Court noted:

Despite its cherished position, the Fifth Amendment addresses only a relatively narrow scope of inquiries. Unless the government seeks testimony that will subject its giver to criminal liability, the constitutional right to remain silent absent immunity does not arise. An individual therefore properly may be compelled to give testimony, for example, in a non-criminal investigation of himself.

See also, Ullmann v. United States, 350 U.S. 422 (1956).

Therefore, by finding that the amendment to the immunity statute limited its scope to use and derivative use immunity,

the Florida Supreme Court did not decide a Fifth Amendment issue contrary to principles announced by this Court. Rather, it interpreted a State law in a manner consistent with this Court's Fifth Amendment precedents.

Assuming, arguendo, that the Florida Supreme Court will continue to follow its Seymour and Lurie² decisions despite the clear indication in the opinion below that the statutory change renders them no longer valid, there is no equal protection violation and decision below was correct. Lawyers, as officers of the Court, may be held to higher standards of conduct than other regulated professions. In Florida, the bar is regulated by the Florida Supreme

² Florida State Board of Architecture v. Seymour, 62 So.2d 1 (Fla. 1952); Lurie v. Florida State Board of Dentistry, 288 So.2d 233 (Fla. 1974).

Court. Art. V, § 15, Fla. Const. Other professions are regulated by the legislature, which has established a State Department of Professional Regulation. Ch. 455, Fla. Stats. Accordingly, the legislature can authorize state attorneys to grant immunity to other professionals but bar immunity can only be granted by the Florida Supreme Court.

This classification does not impair a fundamental right, because, as the State has discussed, the Fifth Amendment's scope is limited to criminal prosecutions. Further, several Federal Courts have rejected claims in bar admission cases that the right to practice law is a fundamental right requiring "strict scrutiny" under equal protection analysis. Lupert v. California State Bar, 761 F.2d 1325, 1327 n. 2 (9th Cir) appeal dismissed U.S. ___, 106 S.Ct. 241 (1985); Nordgren v.

Hafter, 789 F.2d 334, 338 (5th Cir.) cert. denied ____ U.S. ____, 107 S.Ct. 177 (1986); Huffman v. Montana Supreme Court, 372 F. Supp. 1175 (D. Mont.), affirmed. 419 U.S. 955 (1974). Therefore, the appropriate equal protection standard is rational review, i.e., whether the classification bears some fair relationship to a legitimate public interest. Sestric v. Clark, 765 F.2d 655 (7th Cir. 1985); Cline v. Supreme Court of Georgia, 781 F.2d 1541 (11th Cir. 1986); Salibara v. Supreme Court of Ohio, 730 F.2d 1059 (6th Cir. 1984).

Although DeBock has been admitted to practice, he cannot responsibly assert any fundamental right to practice free of inquiry into his character and continued fitness to practice law. As this Court observed in Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975), states have a compelling interest in the practice of

professionals within their boundaries and as part of the power to protect public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. In Edelstein v. Wilenta, 812 F.2d 128, 132 (3rd Cir. 1987), the Court expressly held an attorney's claim there is a fundamental right to practice law was contrary to established precedent that, absent impingement on some other fundamental right, States may establish regulations limiting admission to the bar subject to review only under a rational relationship standard.

The cases cited by DeBock which describe general equal protection principles do not specifically apply to regulations governing the practice of

law.³ It is reasonable for the Court which admits attorneys to practice to have the authority to sanction them for professional misconduct. Standing Committee on Discipline v. Ross, 735 F.2d 1168 (9th Cir. 1984). The Florida Supreme Court found there is a rational basis for holding attorneys to different standards than other regulated professions: "the unique role of attorneys as officers of the court mandates that attorneys be held to the highest of ethical standards." DeBock v. State, 512 So.2d 164, 168 (Fla. 1987). Thus, even if it can be said that an equal protection issue was decided below, the State maintains it was decided correctly and review by this Court is not warranted.

³ Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985), was decided under the Privileges and Immunities Clause, and not the Equal Protection Clause.

DeBock further contends that by adhering to Ciravolo v. The Florida Bar, 361 So.2d 121 (Fla. 1975), the Florida Supreme Court has resolved a Fifth Amendment issue in a manner inconsistent with federal law. This is a misapprehension of the court's comments below at 512 So.2d 168. The rule announced in Ciravolo is that no executive officer can confer immunity from Bar discipline proceedings by virtue of the Florida Constitution's separation of powers. This rule remains intact as a matter of Florida Constitutional law. In the present case, the Court below has correctly ruled that if an attorney/witness desires immunity from bar proceedings, he must request it himself. This hypothetical availability of immunity, and the Florida Supreme Court's ruling concerning standing to request it,

are not dependent on a constitutional or statutory right to immunity.

Finally, citing Lefkowitz v. Cunningham, 431 U.S. 801 (1977), and Spevack v. Klein, 385 U.S. 511 (1967), DeBock asserts that the Florida Supreme Court has decided an important Federal question in a manner conflicting with these decisions. Both cases are distinguishable. Lefkowitz holds that a witness may refuse to testify in a civil proceeding where his answers could later be used in a criminal prosecution; in the present case, DeBock has been given immunity from criminal prosecution. Spevack v. Klein, 385 U.S. 511 (1967), holds that a lawyer can not be disbarred solely because he has claimed the Fifth Amendment privilege; the present case concerns the different matter of whether DeBock, having been given immunity from criminal prosecution, may

continue to refuse to testify in a criminal investigation regarding another attorney.

In sum, it is the State's position that the Florida Supreme Court decided a question of state law -- the scope of the state's immunity statute -- and there is no federal question upon which review can be granted. Michigan v. Long, 463 U.S. 1032 (1983). Alternatively, the Court below's resolution of the Fifth and Fourteenth Amendment issues was correct and consistent with federal precedent.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities, the State of Florida, Respondent, respectfully requests that the Petitioner's Petition for Writ of Ceriorari be denied.

Respectfully submitted,

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